defendant's conduct they had lost the opportunity to control and develop the impact of that local reputation and would thus lose customers;

(2) there were Japanese people in Hong Kong, both tourists and residents. The plaintiffs had established that damage to their goodwill might occur both in Hong Kong and later in Japan. Such damage was recoverable by an action in passing off in Hong Kong. (Star *Industrial Company Limited v. Yap Kwee Kor* [1976] FSR. 256, explained);

(3) the balance of convenience favoured the grant of interlocutary relief.

(Observed: "This is an evolving field of law ... a Court must respond to the changes which have occurred in international communications. The large number of tourists crossing and recrossing boundaries; the speed and efficiency of modern technology which cause business reputation to be more widely spread and recognised than in the past. Courts in other jurisdictions have responded to the change ...).

The facts are so much stronger here as apart from the closer proximity between Singapore and Malaysia compared to Japan and Hong Kong, the first plaintiff in Singapore had in fact been dealing with about thirty companies in Malaysia for more than three years.

To my mind, there was a serious question to be tried and the balance of convenience was in favour of the injunction being granted as applied for by the plaintiffs. I had accordingly granted the order in terms of the application but although I had omitted to state so, it is with the usual undertaking for damages which although is not contained in the order is implied especially so when the plaintiffs had already agreed to it in their supporting affidavit. By consent of both parties on 22 September 1993, stay had been granted on the mandatory orders pending the disposal of the appeal to the Supreme Court.

FIRST CONSOLIDATED SDN. BHD.

v.

PADU EHSAN SDN. BHD.

HIGH COURT, MELAKA
TUAN HAIDAR BIN MOHD. NOOR J.
[CIVIL SUIT NO. 22-113-1992]
23 JUNE 1993

CONTRACT: Payments made by plaintiffs to person purportedly acting on behalf of defendant, to secure subcontracts - Documents executed - Subcontracts awarded to third party - Whether main contractor (defendant) liable for plaintiffs' loss of profits due to the alleged breach.

COMPANY LAW: Director's authority and powers - Person holding himself out as Managing Director of defendant - No resolution passed by defendant as to his appointment - Promises given by the so called 'Managing Director' to award subcontracts to plaintiffs in return for payments - No resolution passed to award subcontracts to plaintiffs - Whether the 'Managing Director' had ostensible authority to act on behalf of the defendant.

In this claim for breaches of subcontracts, 2 suits are consolidated, the facts being similar and the defendants being the same party. The core issue for determination before the Court was whether there had been a subcontract by the defendant to the two plaintiffs companies with regard to 2 separate development projects.

The defendant claimed that it had not subcontracted to either of the plaintiffs since no resolution had been passed by the Directors of the defendant that work on the 2 projects be subcontracted to the plaintiffs. The work had in fact been given out to another company on the passing of a resolution. The plaintiffs however argued that through the conduct and actions of one Saadun who claimed to be the Managing Director of the defendant, the defendant had in fact assured the plaintiffs of the subcontracts but had failed to abide by their assurances. The court thus had to determine whether the said Saadun, whom defendant contended was a liason officer in their company, had ostensible authority to act on behalf of the defendant in relation to the projects and the subcontracting of it.

Saadun failed to appear to testify at the hearing. However 2 documents executed by Saadun binding the defendant to give the subcontracts to the plaintiffs were produced. Defendant admitted the execution but denies it was done on behalf of defendant.

Defendant however did not deny that:

i. a sum of RM30,000 was paid by plaintiff to Saadun as payment for the tender documents for the projects
ii. an account was opened in the name of the defendant in the presence of Saadun, the Chairman/Director of defendant and directors of the plaintiffs, which account required 3 signatories
iii. a Pusat Khidmat Kontraktor Licence was given to defendant and defendant given Bumiputra status wherein the said Saadun was described as a Managing Director; the business card of Saadun also described him as Managing Director
iv. cash payments were made by plaintiff which were utilised towards the payment of salaries and directors' allowances in the defendant company.

Held:

[1] The articles of association of the defendant provides for the appointment of Managing Director. There was however no resolution passed as to the appointment of Saadun as the Managing Director of the defendant. Nevertheless ostensible authority would be conferred on Saadun if Saadun throughout acted as Managing Director to the knowledge of the defendant and was held out by the defendant as being the Managing Director of the defendant. On the evidence shown, it would appear so. The licence and the Bumiputra status given to defendant are important documents and these documents must be within the knowledge of the defendant. The payment of monies by plaintiff allegedly utilised towards staff salaries and allowances of the defendant were not seriously challenged in court by defendant. The opening of the account under defendant's name requiring 3 signatories, including directors of plaintiff also points to the irresistible conclusion that the account was opened for the safeguarding of plaintiffs' interests in relation to the subcontracts.

[2] Reviewing the conduct and actions of Saadun, the conclusion is that defendant knew and supported them by not taking any action. Evidence shows Saadun was more than a liason person taking active roles in the obtaining of the tenders for many projects of the defendant.

[3] The fact that plaintiff had not examined the defendant's articles of association and had not enquired as to whether Saadun had been properly appointed as Managing Director did not prevent plaintiff from establishing their claim against defendant based on their reliance of Saadun's ostensible authority. Further, the circumstances were such that it did not necessitate plaintiff to be alerted or be put on inquiry as to Saadun's authority to act on behalf of defendant. Defendant in fact held Saadun out to be the Managing Director and Saadun thus had the ostensible authority to execute the 2 documents and defendant is estopped from denying responsibility for Saadun's acts. By awarding the subcontracts to a third party, defendant clearly breached the subcontracts to plaintiff when the only action that remained to be taken after the successful tenders were the execution of the formal subcontracts.

[4] In computing loss of profits in their claim for damages, plaintiff submitted the costing work done by a witness who is not a qualified surveyor, nevertheless holding experience in this work. The defendant did not offer evidence of what would be the fair costing. In the circumstances, the submission by plaintiff is accepted.

[Judgment for plaintiffs with interest and costs].

Cases referred to:

Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor. [1964] 1 All ER 630 ***(refd)***

Chew Hock San v. Connaught Housing Development Sdn. Bhd. [1985] 1 MLJ 353 ***(refd)***

Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation & Ors. [1986] 1 Ch 284 ***(refd)***

Morris v. Kanssen [1946] AC 459 ***(refd)***

Teah Kee Keong v. Tambun Mining Co. Ltd. [1968] 1 MLJ 39 ***(refd)***

For the plaintiffs - Yau Jiok Hua (Sheena with him); M/s. Yau Jiok Hua & Co.

For the defendant - S.H. Chooi (Lee Min Choon with him); M/s. Chooi Shee Hoong & Gan

JUDGMENT

Haidar bin Mohd. Noor J:

On 30 May 1993 I gave judgment to the plaintiffs in Suit No.113-1992 and 114-1992 for breaches of subcontracts committed by the defendant as follows:

(1) In respect of Suit No. 113-1992, the sum of RM371,929.50 as damages.
(2) In respect of Suit No. 114-1992, the sum of RM493,227.80 as damages.
(3) Interests as prayed.
(4) Costs of the proceedings.

I indicated to the parties that I will give my reasons later. I now proceed to do so.

Mr. Yau Giok Hua, counsel for the plaintiffs in Suit No. 113-1992 and 114-1992 made an oral application for the consolidation of the two suits on the ground that the issues of law and facts are similar and the defendants are the same though the plaintiffs may be different. Mr. S.H. Chooi, Counsel for the defendant in both suits agreed and the application was accordingly granted by the Court.

The hearing was somewhat protracted due to the late filing of the applications of the defendant for security for costs in respect of both suits (enclosures 83 and 77 in suits 113-92 and 114-92 respectively). The plaintiffs objected to the applications and after hearing the arguments the plaintiffs were given time to file affidavits in reply. The hearing was adjourned to 7 May 1993. After hearing the submissions of both Counsels on 7 May 1993 I was of the view that this was not a proper case for me to exercise my discretion in favour of the defendant and accordingly dismissed the defendant's applications.

At the outset of the hearing, both counsels agreed to the following issues for determination by the court -

(1) whether there was a valid subcontract between the plaintiff and the defendant in respect of the contract awarded by the Majlis Perbandaran Melaka Bandaraya Bersejarah to the defendant ('MPMBB project');
(2) if so, whether there was a breach of the said subcontract;
(3) if there was a breach, what damages suffered by the plaintiff:

Similarly in respect of Suit No. 114-1992 whether there was a valid subcontract between the plaintiff and the defendant in respect of contract awarded by the Perbadanan Kemajuan Negeri Melaka to the defendant ('PKNM project'). Issues 2 and 3 are the same.

Both Counsels also agreed to put in the agreed bundle of documents in respect of both suits. Agreed bundle of documents in respect of suit no. 113-1992 was marked as 'A' and in respect of Suit No. 114-1992 was marked as 'B'.

In determining the issue whether there were valid subcontracts between the plaintiffs and the defendant, the conduct and actions of Saadun bin Basirun ('Saadun'), the director of the defendant would be relevant and important. I would say that he is the "star player" in this consolidated action. I say so because there was no resolution passed by the defendant for him to execute the two documents namely, exhibits P16 and P19 binding the defendant to give the subcontracts to the plaintiffs. It was not disputed that he executed P16 and P19 but the defendant contended he executed P16 and P19 without the defendant's authority, be it express or implied. The plaintiffs, on the other hand, contended that he had the ostensible authority to do so. It is on these premises that I have to consider whether he had the ostensible authority to do so.

It would be appropriate then for me to set out the facts that led to the execution of P16 and P19 by Saadun.

Firstly, it was rather unfortunate that Saadun was not called as a witness. According to the defendant he could not be traced and that was about all. However, the defendant took out a third party proceedings against him in this consolidated suit and the third party notice was served on him and he did not make any appearance at all. No order, as far as I recalled, has been obtained against him by the defendant. Be that as it may, according to Tye Soon Ping (PW1), who is a director of the plaintiffs, Saadun came to see him in early May1992. Saadun told him that he was going to tender for projects under the name of the defendant. The contracts were in respect of earth filling and housing projects. PW1 said that he first came to know Saadun in 1991 when Saadun was a director of Melaka Duty Free Sdn. Bhd. through one of the directors of Melaka Duty Free Sdn. Bhd., one Datuk Lim Teow Jin. PW1 said that he supplied electrical goods to Melaka Duty Free Sdn. Bhd. At the time of the meeting of Saadun and PW1 in early May 1992 Saadun told PW1 that he could get Pusat Khidmat Kontraktor licence under class BX from Kementerian Perusahaan Awam. Saadun indicated to PW1 that the financial backing of PW1 was required. Once the tenders are successful, he will pass the projects to PW1. He mentioned that his company was Padu Ehsan Sdn. Bhd. ('Padu Ehsan') and showed PW1 Padu Ehsan's form 24 and 49 and that he was a director of Padu Ehsan. He also showed to PW1 his name card wherein is stated his designation as the managing director of

Padu Ehsan. The name card was produced and marked as P1.

The following facts would appear to be not disputed -

(i) Padu Ehsan through Saadun, got the Pusat Khidmat Kontraktor licence (page 39 of 'A') wherein Saadun was described as pengarah pengurusan (managing director)

(ii) Padu Ehsan was given the status of Bumiputra (see page 37 of 'A') and Saadun was described as pengarah pengurusan (managing director).

(iii) Padu Ehsan was given the two contracts namely, MPMBB project which was given on 22 September 1992 (see exhibit P15) and PKNM project was given on 19 October 1992.

(iv) The following payment vouchers were acknowledged by Saadun for the purposes stated therein -

(a) P2 - cash payment of RM150 for purchase of tender document for MPMBB project by First Consolidated. P2A - is the receipt.

(b) P3 - cash payment of RM150 for purchase of tender form for PKNM project by First Consolidated. P3A - is the receipt.

(c) P4 - cash payment of RM150 for purchase of tender form for PKNM for Tangga Batu Project by First Consolidated. P4A - is the receipt.

(d) P8 - cheque payment voucher of RM3,000 as advance for salaries and allowances of staff of Padu Ehsan by Veetak Enterprise.

(e) P9 - cheque payment voucher of RM2,000 as advance for opening of Chung Khiaw Bank account under the name of Padu Ehsan.

(f) P11 - cheque payment voucher of RM500 being quantity surveyor's fees in respect of Pembinaan Balai Polis dll di Sungai Udang.

(g) P12 - payment voucher of RM5,000 for salaries of staff of Padu Ehsan and their directors allowances.

(h) P13 & P14 - SOCSO payment was made for and on behalf of Padu Ehsan. In both P13 & P14, Saadun signed as the managing director.

It is not disputed that Padu Ehsan was successful in two projects namely, MPMBB project and PKNM project. According to PW1 in respect of MPMBB project which was worth RM1,921,000 (see P15) Saadun came to his office and told him so by showing P15. Saadun then told PW1 to get ready to start work for the MPMBB project. However, Saadun also told PW1 that Padu Ehsan needed RM110,000 as commission for giving the project, RM30,000 to be by way of advance and RM80,000 to be by progress payments. PW1 informed Saadun that he has to get the directors clearance first for the advance of RM30,000. On 30 September1992 PW1 informed Saadun that the directors agreed to pay the advance and agreed also to undertake the MPMBB project.

On 1 October 1992 in the morning Saadun came to see PW1 and together with one Goh Teik Seng (PW4) went to the bank to cash RM30,000 and thereafter proceeded to a legal firm to see one Mr. Yau. After discussion with Mr. Yau regarding the requirement of Saadun, Mr. Yau was asked to prepare a letter (P16) and Saadun signed P16 - This fact of Saadun signing P16 is not disputed. The handing over of cash RM30,000 is not disputed either - only whether it was received by Saadun for the benefit of the defendant that was disputed by the defendant. Saadun also asked PW1 to put up a signboard at the site. This was accordingly done - see P17. However, Saadun asked PW1 not to start work but to wait for the formal contract between Padu Ehsan and MPMBB. PW1 was not informed at all by Saadun of the formal contract between Padu Ehsan and MPMBB. By end of October 1992, PW1 passed by the site and saw somebody else working on the project. PW1 made an investigation and found that a company called Jati Erat Sdn. Bhd. was given the subcontract for the MPMBB project. Consequently notices were issued to Padu Ehsan regarding MPMBB project (see P18). Hence the claim for damages.

In respect of the PKNM project Saadun came to see PW1 in the morning of 20 October1992 at his office and told PW1 that the defendant got the PKNM project. Saadun asked PW1 to go to the PKNM's office that afternoon to see the Chief Engineer, Mr. Tai Nam Fatt (PW6) to collect the letter of acceptance of tender on defendant's behalf. That same afternoon PW1 went to see Mr. Tai and collected the letter of acceptance and acknowledged on the right handside top corner of the letter of PKNM's copy. PW1 was asked by Saadun to do this as

he had a meeting in Kuala Lumpur on that day. On 21 October 1992 Saadun came to see PW1 and brought with him a letter with the letter head of the defendant. A letter similar to the earlier letter (P16) was typed on the defendant's letter (P19). This project was given to Binaan Johanesa. The contract price was RM2,098,100. The defendant was to be given 3% of the contract price for the subcontract to be given to Binaan Johanesa. P19 is again not disputed except as to whether Saadun executed it for and on behalf of the defendant. Again Saadun asked PW1 to wait for the formal contract between the defendant and PKNM. PW1 was never informed of the formal contract between the defendant and PKNM. In the begining of November 1992 PW1 passed by the site of PKNM project and found somebody else was doing the project. PW1 investigated and found that the same company, that was given the MPMBB project was given the PKNM project and the company was Jati Erat Sdn. Bhd. As a result, PW1 as director of Binaan Johanesa instructed that a letter be issued to the defendant. In fact two letters were written (see P20 and P21). Hence this action filed for damages for breach of subcontract by the defendant.

The essence of the defence is that the defendant did not pass any resolution to give the subcontracts of the main contracts in respect of the two projects to the plaintiffs and in fact the defendant had by resolution given the subcontracts to Jati Erat Sdn. Bhd. In the alternative the defendant alleged that P16 and P19 executed by Saadun, a director of the defendant, was done without authority and therefore P16 and P19 are ultra vires, null and void. Kuan Ee Leong, the chairman/director of the defendant (DW1) disclaimed any knowledge of the actions of Saadun in executing P16 and P19 and collecting advances from the plaintiffs allegedly on behalf of the defendant. According to DW1, Saadun has no authority to do so and he was not a managing director of the defendant also. However, DW1 admitted that he did go to the Chung Khiaw Bank to open an account in the name of the defendant together with Saadun and Datuk Lim Teow Jin. However, he did not mention the presence of Goh Teck Seng (PW4), a director of Binaan Johanesa. PW4's evidence that he was present as well was not challenged by the defendant. Datuk Lim Teow Jin is a director of First Consolidated and Binaan Johanesa and is not a director of Padu Ehsan. DW1 explained that the account was opened in anticipation of a subcontract to be given to Datuk Lim's company called Kiara Mutiara Sdn. Bhd. and the opening of the bank account has nothing to do with the plaintiffs as claimed by them.

As I said earlier it is not disputed that there was no resolution giving the subcontracts to the plaintiffs and neither was Saadun, a director of the defendant expressly authorised to execute P16 and P19, I will have to consider then whether on the evidence adduced the plaintiffs succeeded in showing that Saadun had ostensible authority to act on behalf of the defendant.

In my view it would seem clear that the defendant can enter into the kind of contract as in this case as the objects of the defendant would appear to be very wide. There is certainly no resolution authorising Saadun, a director of the defendant, to execute P16 and P19 and to also receive money for and on behalf of the defendant. Equally there is no resolution of the defendant appointing Saadun as the managing director or delegating any powers to him. However, by article 89 of the articles of association of the defendant, there is power to appoint managing director or managing directors and likewise article 104 provides for the general power of directors.

Article 104 reads:

> The management of the business of the company shall be vested in the directors and the directors may exercise all such powers and do all such acts and things as the company is, by its memorandum of association or otherwise authorised to exercise and do and are not hereby or by the Companies Act directed or required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the Companies Act and of these articles and to any resolution not being inconsistent with these articles from time to time made by the company in general meeting provided that no such regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

If there is no provision in the articles of association of the defendant for the appointment of managing director then the plaintiffs could not have been heard to say that Saadun with whom they contracted had been held out by the defendant as its managing director. However, the position here is otherwise as there is article 89 of the defendant's articles of association which

empowers the appointment of managing director or managing directors. In that event even though there is no resolution appointing Saadun as the managing director but if there is evidence shown that Saadun throughout acted as managing director to the knowledge of the defendant and was held out by the defendant as being managing director and the ostensible authority thus conferred could bind the defendant since its articles of association in fact provided for there being managing director of the defendant (see *Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor.* [1964] 1 All ER 630). The question that arises is whether there was such evidence. In this respect we have the evidence of the Pusat Khidmat Kontrator licence and defendant being given the Bumiputra status wherein Saadun was described therein as managing director (see pages 37 and 39 of 'A'). This is quite apart from his business card (P1) wherein his position was also described as managing director of the defendant. The licence and the Bumiputra status given to the defendant are important documents and these documents must be within the knowledge of the defendant. In fact DW1 under cross-examination admitted that the defendant must have provided the details in the application for the licence and such details must necessarily include the position of Saadun as managing director in the defendant otherwise the description of Saadun as managing director would not appear in the licence. The fact that the plaintiffs had not examined the defendant's articles of association and had not enquired whether Saadun was properly appointed managing director did not prevent their establishing their claim against the defendant based on their reliance of Saadun's ostensible authority (*Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd and Anor.* [1964] 1 All ER 630). The Federal Court in *Chew Hock San v. Connaught Housing Development Sdn. Bhd.* [1985] 1 MLJ at p. 353 quoted with approval the judgment of Diplock LJ in *Freeman and Lockyer's* case on ostensible authority -

> An 'apparent' or 'ostensible' authority on the other hand, is a legal relationship between the principal and the contractor created by the representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal in to a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent has actual authority to enter into the contract.

Though Saadun was not properly appointed as the managing director of the defendant but as I said earlier, there is provision by way of Article 89 for the appointment of managing director. Article 91 further sets out the powers of managing director and the powers were wide enough for a managing director to execute P16 and P19 as in this case unless there is evidence to the contrary. There is, of course, none in this respect. In fact, according to PW1, Saadun showed him a contract with Melaka Baru Sdn. Bhd. where he signed as managing director of the defendant. (see p. 39 of 'A'). This was not disputed by the defendant.

It is not disputed that Saadun took money from the plaintiffs to pay for the tender documents for the two projects for which he promised to subcontract the two projects to the plaintiffs in the event that the defendant was successful in the tenders. On top of that RM3,000 was advanced to the defendant towards payment of salaries and staff of the defendant on 28 August 1992 (see evidence of PW1). This was not seriously challenged by the defendant. In fact Goh Teck Seng (PW4) a director of Bina Johanesa and also sole proprietor of Veetak Enterprise went with Saadun to the defendant's office where PW4 saw Saadun hand over the money to one of the staff of the defendant. Further on 30 September1992 RM5,000 was given to Saadun for payment of salaries of staff and directors allowances of the defendant (see exhibit P12). Again, this piece of evidence did not seem to be challenged by the defendant.

The other important evidence that tended to show that the defendant held out Saadun as having ostensible authority to act on behalf of the defendant would be the opening of an account with Chung Khiaw Bank. A sum of RM2,000 was advanced by Veetak Enterprise

for opening of the bank account no. 252-308-421-8 under the name of the defendant. This account was opened, according to PW1, for the purpose of safeguarding the interests of the plaintiffs for the subcontracts to be given to the plaintiffs if the defendant is successful in the tenders. For this account there were three compulsory signatories, namely DW1, Saadun and Datuk Lim Teow Jin, one of the directors of the plaintiffs. However, according to DW1 the purpose of opening this account was for another project known as Drainage Roadworks at Taman Melaka Baru Phase III as Datuk Lim Teow Jin's company, Kiara Mutiara Sdn. Bhd. was interested in getting the subcontract for this project from the defendant. In this respect a resolution (P10) was made by the defendant. Looking at P10 nowhere was it stated that the opening of the account was for the benefit of Kiara Mutiara Sdn. Bhd. Be that as it may it was in evidence that it was PW4, who as a director of Binaan Johanesa, took RM2,000 from his company, Veetak Enterprise to open the account. PW4 himself was present at the opening of the account and he was never cross-examined that the money came from Datuk Lim Teow or his company if DW1's evidence is to be accepted on this aspect of the opening of the bank account. It would be difficult to accept DW1's evidence in respect of the purpose of the opening of the account. It is to be noted that Datuk Lim Teow Jin is a director of the plaintiffs and the irresistible conclusion is that the opening of the bank account was for the purpose as explained by PW1 and supported by PW4. Datuk Lim Teow Jin was not called by the defendant and therefore the evidence of DW1 on the purpose of the opening of the bank account is not supported. In the circumstances I am of the view that DW1 knew the purpose of opening of the bank account and supported it and accordingly acknowledged the action of Saadun.

Taking into consideration the conduct and actions of Saadun as described by me earlier on, I cannot but come to the conclusion that the defendant knew and supported them by not taking any action. In fact, the claim of DW1 that Saadun's role in the defendant is merely to do liasion work with the government departments or authorities would seem to be to the contrary. Evidence showed that Saadun took active part in the tenders for the two projects besides the other projects also. We also have evidence that the other director of the defendant, Isthnin knew of what Saadun was doing with PW1. This aspect of the evidence was not disputed by the defendant as PW1 was not cross-examined on this piece of evidence.

It may be true that even if persons contracting with a company do not have actual knowledge that an irregularity has occurred, they will be precluded from relying on the rule if the circumstances were such to put them on inquiry which they failed duly to make. In this respect, *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation &Ors.* [1986] 1 Ch at p. 284 quoted Lord Simonds in *Morris v. Kanssen* [1946] AC 459 having pointed out at p 475;

> But the maxim has its proper limits ... It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

Looking at the totality of the evidence of the plaintiffs especially in respect of exhibits 'A' at pp. 37 and 39, P13, P14 I am of the view that the circumstances were such that it would not necessitate the plaintiffs to put them on inquiry whether Saadun was duly appointed as managing director. In *Freeman's* case, it is stated at p. 637 -

> It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of association, which are public documents open to inspection by all; see *Mahony v. East Holyford Mining Co.* [1875] LR HL 869. However, by the rule in *Royal British Bank v. Turquand* [1856] 6E. & B. 327, re-affirmed in *Mahony's* case, it was also established, in the words of Lord Hatherley in the latter case;
>
> > that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company.
>
> Thus, in *Biggerstaff v. Rowatt's Wharf Ltd* [1986] 2 Ch. 93, where the articles of association conferred power to appoint a

managing director, the company was held bound by the act of a person who purported to contract as its managing director though he had never been formally appointed as such.

I am therefore of the opinion that in the circumstances of this case the defendant held out Saadun as the managing director and had the ostensible authority to execute P16 and P19 and the defendant is therefore estopped from denying responsibility for Saadun's acts. By giving the subcontract to Jati Erat Sdn. Bhd. in the face of the commitment of Saadun on behalf of the defendant to the plaintiffs, the defendant clearly breached the subcontracts to the defendant whereby the only action needed to be taken is for the formal subcontracts to be executed after the formal contracts between defendant and Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka are signed.

Having ruled that there was a breach of the two subcontracts, what damages are suffered by the plaintiffs?.

The plaintiffs' claim for damages is by way of loss of profits (*Teah Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39). The plaintiffs adduced evidence through PW1 and PW7 where the costing was explained at length and in details as to how the loss of profit was arrived at. It may be true that PW7 is not a qualified quantity surveyor but he had given evidence of his experience in respect of such work. In any event the defendant did not seem to seriously challenge the costing was erroneous. The defendant did not even offer evidence of what could possibly be the fair costing. This they could very well do through DW2, whose company was awarded the subcontracts of the two projects. In fact DW2 gave evidence that he prepared the tenders for the two projects in which event he would be the best person to rebut the costing of the plaintiffs if the defendant felt that such costing was erroneous. In the circumstances, considering the explanation of PW1 and PW7 on their costing and the loss of profits of the plaintiffs I do not see any good grounds for me not to accept their evidence. Accordingly I gave judgment as set out earlier in my judgment.

GHEE SENG MOTOR

v.

LING SIE TING

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[CIVIL APPEAL NO. KG. 14 OF 1992 (II)
28 JULY 1993

CONTRACT: Carriage of goods by sea - Vessel with cargo on board sinks - Evidence to show the vessel was taking in water - Water was pumped out and vessel had attempted to continue on its course - Whether contract had been frustrated due to inevitable accident - Whether all reasonable care had been taken to prevent the sinking of the vessel.

TORT: Negligence - Doctrine of res ipsa loquitor - Party bearing the burden of proof.

APPEAL: Guiding principles for an appellate court in considering whether the lower court had taken full advantage of the benefit of having heard and seen the witnesses in court.

The plaintiff had entered into a contract with the defendant, a common carrier, to ship a motor car to Limbang, Sarawak. The defendant's vessel left Kuching on 30 September 1988 but enroute the captain discovered that the vessel was tilting and diverted to Sibu where the water was pumped out. At around 5.30 am on 2 October 1988 the vessel was abandoned and consequently sunk into the sea.

The plaintiff brought an action against the defendant for breach of contract and alternatively for negligence in the carriage, care and charge of the motor car by reason whereof the said car had sunk with the vessel at Sibu Wharf. The plaintiff also relied on the doctrine of *res ipsa loquitor*. The learned Magistrate dismissed the plaintiff's claims and the plaintiff appeal against the whole of the decision.

The defendant pleaded frustration of the contract due to inevitable accident. Defendant claimed that all reasonable care and skill had been exercised in trying to avoid the incident which an occurrence beyond their control. Defendant also contended that plaintiff had voluntarily accepted the risk as plaintiff had neglected to obtain insurance cover to the motor car despite their advice to do so. Defendant also relied on a Freight Advice Bill and an exclusion clause therein exempting claims for loss or